City of Hamilton, Ohio and Transit Management of Hamilton, Inc. *and* Amalgamated Transit Union Local 738, AFL–CIO

Transit Management of Hamilton, Inc. *and* Amalgamated Transit Union Local 738, AFL–CIO. Cases AO–286 and 9–RM–986

March 25, 1991

ORDER DENYING REVIEW AND ADVISORY OPINION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, OVIATT, AND RAUDABAUGH

On October 9, 1990, Transit Management of Hamilton, Inc. (TMH or the Employer) filed a petition for an election in Case 9–RM–986. Thereafter, a hearing was held before a hearing officer of the National Labor Relations Board and on January 10, 1991, the Acting Regional Director for Region 9 issued a Decision and Order dismissing the petition. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Order. The City of Hamilton, Ohio (the City) filed a brief in support of the request,[1] and the Union filed a response in opposition to the request.

Pursuant to Section 102.98(a) of the National Labor Relations Board Rules and Regulations, on February 4, 1991, the City and TMH jointly filed a petition for an advisory opinion in Case AO–286 and a brief in support, respectively, seeking a determination whether the Board would assert jurisdiction over TMH. The Union filed a brief in opposition to the petition.

The Board has considered the entire record in these cases, has consolidated Cases 9–RM–986 and AO–286 for decision and makes the following findings.

1. Pursuant to contracts with the City, TMH, and its parent company, ATE National Bus Services, Inc. (ATE), TMH operates a bus system with the city serving the general public. Operating funds for the system are comprised of approximately 50 percent in Federal funds, 15–20 percent in state funds, and 30–35 percent in local funds. Local funding is derived from fares and the general fund of the city. During the 12-month period preceding the hearing in Case 9–RM–986 gross revenues for the transit system exceeded $250,000. During the same period TMH purchased and received goods and materials in excess of $50,000 directly from sources outside the State of Ohio.

2. The busdrivers and mechanics employed by the bus system have, during all times relevant, been represented by Amalgamated Transit Union Local 738, AFL–CIO (the Union). All parties agree that the Union is the recognized bargaining agent for the employees in an appropriate unit.

3. On October 18, 1988, the Union filed a Request for Recognition with the State of Ohio, State Employment Relations Board (SERB) naming the City as the Employer of the mechanics and busdrivers whom it represented. On November 8, 1988, the City filed an Objection to Request for Recognition, arguing that the employees in issue were not public employees but rather the employees of TMH, a private employer. On May 3, 1990, SERB issued a Certification Pursuant to Request for Recognition, certifying the Union as the bargaining representative of the same busdrivers and mechanics in issue here. In a companion opinion, SERB held that the City was the Employer of the busdrivers and mechanics, that TMH was its agent, and that the employees were ''public employees'' subject to its jurisdiction. The certification and opinion have been appealed by the City and TMH to the appropriate state court.

The Acting Regional Director dismissed the petition in Case 9–RM–986. In doing so, he relied on the holding of *United States Gypsum Co.*, 157 NLRB 652 (1966), that a petition for election under Section 9(c)(1)(B) of the Act will not lie where an employer is currently recognizing the labor organization and where the employer has not demonstrated, by objective considerations, that it has reasonable grounds to doubt the labor organization's representative status. The Acting Regional Director rejected TMH's argument that because the Union has never been certified, the Board's *General Box*[2] doctrine permits an employer or a union to secure the advantages of a Board certification.[3]

In its request for review, the Petitioner seeks reversal of the Acting Regional Director's decision and a determination by the Board that TMH is the employer of the employees in the unit and that TMH is an employer under the jurisdiction of the Board thereby preempting the jurisdiction of the State of Ohio. The City as a Party in Interest filed a statement in support of the request for review.

After careful consideration, we find that the Acting Regional Director's decision is consistent with existing Board precedent[4] and that the request for review does

[1] The city intervened in Case 9–RM–986 as a Party in Interest.

[2] *General Box Co.*, 82 NLRB 678 (1949).

[3] The Petitioner relied on the Board's statement in *Pennsylvania Garment Mfrs. Assn.*, 125 NLRB 185, 186 fn. 7 (1959), that under *General Box*, supra, the benefits of certification are available to the employer as well as to the incumbent labor organization even where the employer has recognized the Union for many years.

[4] *United States Gypsum*, supra, overruled to the extent inconsistent, the Board's earlier holding in *Whitney's*, 81 NLRB 75 (1949), and similar cases that Sec. 9(c)(1)(B) provided an unqualified right to an employer to question the majority status of an incumbent union. Accordingly, TMH's reliance on *Pennsylvania Garment Mfrs.*, supra, is misplaced as that case was to the extent it was inconsistent, implicitly overruled by *United States Gypsum*. Cases decided subsequent to *United States Gypsum* have applied the ''objective consid-

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not present a compelling reason for granting review. Accordingly, the request for review is denied in Case 9–RM–986.

We also deny the joint request of the City and TMH for an advisory opinion in Case AO–286.

Although we would find, based on the undisputed allegations above that the transit system satisfies the Board's commerce standards for asserting jurisdiction,[5] this is not the primary issue raised by TMH and the City. Rather, it is clear from the petition and from the briefs that the primary issue on which the Joint Petitioners seek an opinion is whether TMH has sufficient control over the employment conditions so as to permit meaningful collective bargaining, i.e., whether the Board would assert jurisdiction over TMH under the principles of *Res-Care, Inc.*, 280 NLRB 670 (1986). This issue is not appropriate for resolution in an advisory opinion proceeding under Section 102.98(a).[6] Accordingly, we decline to address it and the petition for an advisory opinion is dismissed.

erations'' test for both certified and uncertified incumbent unions. *St. Joseph Hospital & Medical Center*, 219 NLRB 892 (1975); *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962, 963 (1970); and *Cantor Bros., Inc.*, 203 NLRB 774, 778 (1973).

[5] See *Charleston Transit Co.*, 123 NLRB 1296 (1959).

[6] *ITT Job Training Services*, 297 NLRB 250 (1989); *Command Security Corp.*, 293 NLRB 593 (1989), and cases cited therein (*Res-Care* issue); and *District 65, Wholesale, Retail, Office & Processing Union*, 186 NLRB 791 (1970), and *James M. Casida*, 152 NLRB 526 (1965) (preemption issue).